Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1994-1995 TERM

ROBERT W. HARTNAGEL, Petitioner

V.

GENERAL MOTORS CORPORATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Appellant
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A. QUESTIONS PRESENTED FOR REVIEW

1. Where a lawsuit incorporating a claim of sex discrimination based on disparate impact was initiated prior to calendar year 1989 and brought to trial following enactment of the Civil Rights Act of 1991, does a court below create a Separation of Powers conflict under Article III, Section 2 of the United States Constitution and abridge a plaintiff's Fourteenth Amendment due process rights by ruling that the Act was "not retroactive" and would "not be applicable" at trial?

a. Does such a determination have the effect of imposing on a prospective basis a procedural disparate impact burden of proof standard which did not exist when the disputed conduct occurred or when the lawsuit was filed and which, prior to the commencement of trial, had been intentionally overruled and replaced by a Federal statute?

b. When Congress enacts a law with the stated purpose of overruling a procedural trial standard created by a decision of the Supreme Court of the United States, does enactment of the statute prevent continued retroactive

operation of the overruled standard in trials occurring after the effective date of the law?

c. Where a plaintiff has demonstrated that a respondent uses a particular employment practice that causes a disparate impact on the basis of sex, does a defendant in a post-Act trial of a pre-1989 lawsuit meet the existing statutory burden of proof responsibilities by demonstrating a "business justification" explanation for the identified adverse practice?

d. Is a plaintiff denied a full and fair opportunity to support a claim of unlawful sex discrimination reflecting the continuing 28-month application of a facially neutral employment practice when, at the midpoint of trial, an evidentiary temporal limitation is imposed preventing the introduction of any trial exhibits or testimony reflecting any adverse gender impact which occurred more than 325 days prior to the plaintiff's displacement from active employment?

2. Have courts of the Fifth and Sixth Circuits misinterpreted controlling state case law by creating a federal judicial doctrine

which assigns an unequivocal at-will meaning to Michigan and Texas employment contracts which stipulate that "employment under the agreement will be from month to month only on a calendar month basis" where no supplemental express understanding has been reached between the parties specifically relieving the employer of an obligation to provide "just cause" notice of termination during and within the operation of an established contractual calendar month period of employment?

a. Does such an at-will interpretation, occurring in conjunction with a trial proceeding conducted seven months after the contractual employment relationship had ended provide an appropriate bas s for withholding a breach of contract instruction seeking a jury determination of the fact issue applicable to a Texas employee's reasonable reliance on an express promise of Job Security?

3. Does a federal Court of Appeals exceed the discretion authorized in Taylor v. McKeithen, 407 U.S. 191, 194 at note 4, 92 S.Ct. 1980, 1982, 32 L.Ed.2d 648 (1972) and

impair an appellant's Fourteenth Amendment due process rights by using the administrative mechanism of "Affirmance Without Opinion" to dispose of issues properly raised on appeal which present matters of significant legal precident and require new interpretations of federal and state law?

B. LIST OF PARTIES

Names of all parties appear in the captions of the case.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The district court and court of appeals decisions are unreported.

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

(i) Date of Decision of U.S. Court of Appeals for the Fifth Circuit sought to be reviewed: September 6, 1994.

(ii) None

(iii) Inapplicable

(iv) The jurisdiction to review the judgement below rests on 28 U.S.C. 626 (c) (1).

F. THE STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Civil Rights Act of 1991 (Public Law 102-166, 105 Stat. 1071) (CRA-91) describes the purposes of the Act, in pertinent part, as follows:

> "An Act...To amend the Civil Rights Act of 1964 to strenghten and improve Federal civil rights laws...to clarify provisions regarding disparate impact actions, and other purposes...
>
> "The Congress finds that--
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections...
>
> "the purposes of this Act are--

(2) to codify the concepts of "business necessity" and "job related" as enunciated in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio...

"to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964..."

"SEC. 105 BURDEN OF PROOF IN DISPARATE IMPACT CASES.

"(k)(1)(A) An unlawful employment practice based on disparate impact is established only if--

"a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistant with business necessity..."

"Subsection 402(a) [e]xcept as otherwise specifically provided, this Act and the ammendments made by this Act shall take effect upon enactment."

Applicable provisions of the United States Constitution include the following:

Article I. Section 10 provides, "No State shall...pass any...law imparing the obligations of contracts..." Article III. Section 2 (b) provides ..."the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The Fourteenth Amendment provides, ..."nor shall any State deprive any person of life, liberty, or property, without due process of law;"

G. CONCISE STATEMENT OF THE CASE

a. NATURE OF THE CASE

Plaintiff Robert W. Hartnagel was a 49 year old, mid-management, General Motors employee, with 26 years of service and consistantly Superior performance ratings when, in October, 1986, he was informed that the position he held was being "eliminated" as a result of a merger of two adjacent regional GM operating units.

Despite the existance of an express promise of Job Security based on comparative length of service, which was applicable to "any reduction in force situation," the job functions of the three employees in Hartnagel's 7-state territory, which was said to have been "closed," were assigned to three lesser service employees in the adjoining regional territory which was said to have remained "open." Hartnagel's request to be permitted to transfer on a length of service basis into the combined operation was denied. A well-recognized medical hardship situation was severely impacted by this decision.

After two subsequent requests for

reconsideration of this decision were rejected, Hartnagel submitted a formal complaint under General Motors' "Open Door" program.

Following completion of the merger, a previous offer of employment was withdrawn and his employment options were reduced to a single choice: acceptance of "voluntary" separation on a cash buyout basis. He then was denied reassignment for nine months before being placed on involuntary layoff status. Shortly before the scheduled commencement of the trial of this lawsuit, he was recalled to a presumed management position which in fact imposed an extended "second residence" work assignment, creating intolerable conditions and ending in final separation.

b. PROCEEDINGS IN THE COURTS BELOW

This action was brought by Robert W. Hartnagel on April 29, 1988 against General Motors Corporation for discriminaton on the basis of age in violation of 29 U.S.C. 621, et. seq. and on the basis of his sex in violation of 42 U.S.C. S 2000e-2(a) and for breach of contractural agreements governing his employment. At the conclusion of trial on

January 30, 1992, the jury returned a verdict stating that "Hartnagel did not prove" by a preponderance of the evidence that GM had discriminated against him or constructively discharged him because of his age or because of his sex. Notice of appeal was filed on March 2, 1992.

Following this Court's decisions on April 26, 1994, regarding certain considerations regarding "retroactive" application of the Civil Rights Act of 1991 (CRA-91), Hartnagel was granted permission to submit a Supplemental Brief describing the relevance of these decisions to the issues addressed in this appeal.

The court below ordered on September 6, 1994 that Hartnagel's appeal was concluded, without oral argument, under Local Rule 47.6. Requests were filed seeking Panel Rehearing (Denied 10/27/94), En Banc Rehearing (Denied 10/27/94), Stay of Mandate and Petition for Certification of a Question of Law the the Supreme Court of Texas (Denied 11/28/94).

C. STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

1. In response to appellant's motion to

supplement the official record of this proceeding, the district court issued an order on November 20, 1992, stating in pertinent part,

> "...the rulings made by this Court concerning...the applicability of the Civil Rights Act of 1991...are contained in the record filed with the Fifth Circuit."

Petitioner has been unable to identify any document in the official record which reflects this specific ruling. As a result, the references to the district court's findings which are incorporated in this petition are based on Hartnagel's afidavit describing the statements which were made from the bench in his presence and on the specific pleadings which are contained in the supplemental record on appeal. These pleadings reflect the efforts appellant has made to clarify this matter during the course of the proceeding in the court below. The official trial transcript does not reflect the portion of the trial proceeding wherein this ruling was made.

There has been no assertion by General Motors that this ruling was not made as petitioner has described it, and the trial

court's determination moreover was entirely consistant with the posture adopted within the Fifth Circuit regarding retroactive application of CRA-91. This explanation is intended solely for the purpose of identifying the source of the quotations which have been used here, and not because any dispute is believed to exist with respect to the substance of the ruling itself.

H. (INAPPLICABLE)

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The U.S. District Court for the Northern District of Texas, Dallas Division had original jurisdiction due to federal questions raised under 29 U.S.C. S 621 et. seq.; 42 U.S.C. S 2000-2(a); and 29 U.S.C. 626 (c) (1).

J. DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Despite the extensive direction this Court has provided in its Landgraf v. USI Film Products and Rivers v. Roadway Express Inc. decisions, more than three years after its enactment, the Civil Rights Act of 1991 continues to reflect major uncertainties of

compelling national significance and concern.

Petitioner contends that the intent of Congress to both overrule and replace the burden of proof formulation established in Wards Cove Packing Co. v. Atonio, which became codified upon enactment of CRA-91, removed any authority for assigning this burden in trial proceedings commencing after November 21, 1991, where the lawsuit had originated prior to June 4, 1989.

As an unavoidable prospective consequence of this legislation (as opposed to a retroactive application of the statute itself), this proof formulation therefore ceased to exist as an appropriate standard for trials of pre-1989 lawsuits conducted from that point forward. The clear statement of Congressional intent which is incorporated in the statute had the effect of "mandating the absence" of the Wards Cove burden and reinstating the proof standard which existed at the point this lawsuit was filed. Application of the overruled standard produced a substantial injustice when this case was brought to trial.

Petitioner argues that a federal judicial

doctrine which assigns an unequivocal at-will meaning to an express contract which provides that employment under the agreement will be "from month to month only on a calendar month basis" reflects a misinterpretation of state law and an misunderstanding of the employment circumstances applicable to this lawsuit.

Such a contract does not prevent an employee's reasonable reliance on an express promise of Job Security under Texas law. The fact issue dealing with this reliance was properly a matter for jury determination. The trial court's application of this federal doctrine to prevent submission of a breach of contract question to the jury exceeded the judicial authority granted by the U.S. Constitution and abriged the plaintiff's Fourteenth Amendment rights.

1. PROSPECTIVE AND RETROACTIVE OPERATION OF A JUDICIALLY-CREATED PROCEDURAL TRIAL STANDARD IS SUBJECT TO LIMITATIONS IMPOSED BY SEPARATION OF POWERS PROVISIONS OF THE U.S. CONSTITUTION.

The lawsuit addressed in this petition was filed on April 29, 1988. The Supreme Court of the United States rendered a decision in its review of Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989) on June 5,

1989. The Civil Rights Act of 1991 (CRA-91) was enacted on November 21, 1991. This case was brought to trial two months after CRA-91 was enacted.

Article III, Section 2 (b) of the United States Constitution states:

> "...the Supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make"

In conjunction with this Court's review of Landgraf v. USI Film Products, ___ U.S. ___ , 114 S. Ct. 1483 (1994), Justice Scalia wrote,

> "...the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively."

Petitioner Robert W. Hartnagel argues:

(1) Separation of Powers provisions of the United States Constitution prohibit the prospective application of a judicially-created procedural trial standard which has been overruled by a federal statute when that standard was not in existance at the point the lawsuit was filed.

(2) The Civil Rights Act of 1991 codifies the intent of Congress to both overrule and replace the disparate impact burden of proof standard created by the Wards Cove Packing Co. v. Atonio decision. This direction was to take effect upon enactment of the statute.

(3) In post-Act trials of lawsuits which were filed prior to June 4, 1989, the Courts below have exceeded the judicial authority granted under Article III, Section 2 of the United States Constitution and abridged plaintiffs' Fourteenth Amendment due process rights by continuing to apply on a prospective basis a Wards Cove-based procedural disparate impact burden of proof formulation which was overruled by Congress on November 21, 1991.

The Wards Cove decision was the law of the land at no time when the events which led to petitioner's lawsuit were taking place, nor was this decision in existance at the point when the lawsuit was filed. Respondent General Motors did not rely on the Wards Cove decision when these events occurred, and neither should it have been relied on after the procedural burden of proof standard it created was

overruled and replaced by Congress two months before the trial commenced.

a. THE STATUTORY DIRECTION PROVIDED IN CRA-91, IN CONCERT WITH WELL-RECOGNIZED PRINCIPLES OF LAW, MANDATE THE ABSENCE OF AN OVERRULED WARDS COVE-BASED DISPARATE IMPACT BURDEN OF PROOF FORMULATION IN POST-ACT TRIALS OF PRE-1989 LAWSUITS.

In Landgraf v. USI Film Products and Rivers v. Rodeway Express, Inc., ___ U.S. ___, 114 S. Ct. 1510 (1994) this Court determined that CRA-91 does not evince any clear evidence of congressional intent as to whether the the particular features of the Act pertaining to these two lawsuits applied to cases arising before the Act's passage. Unlike the provisions of the Act which were addressed in the Landgraf and Rivers decisions, the statutory direction provided regarding the Wards Cove disparate impact burden of proof standard is both explicit and restrictive.

As a result, precisely the same judicial retroactivity principles which are articulated in Landgraf and Rivers with respect to the non-disparate impact proof features of the Act exert a quite different--and in certain respects, even opposite effect--as they apply

to a consideration of the prospective application of the Wards Cove proof standard in trials occurring after the enactment of CRA-91.

First, by specifically directing that a law which both overrules and replaces a judicially-created procedural trial standard is to become effective upon enactment, Congress has removed any basis for applying judicial "default" rules as a means of determining the "proper reach" of the burden of proof requirements the statute creates.

Second, it is the same clear statement of intent which argues decisively against the continued retroactive operation of an overruled Wards Cove proof formulation in subsequent trials involving lawsuits which predate the Supreme Court's Wards Cove decision. Such an application has the effect of imposing a "new duty" on a "transaction already completed" and conflicts directly with the principle which holds that the legal effect of conduct should be assessed under the law which existed when that conduct took place.

Third, while a judicial construction represents the controlling and authoritative

interpretation of what an existing law means both before or after the decision was rendered, such an interpretation does not take precidence beyond the point where Congress enacts a new law. Judicially created trial standards are not controlling with respect to "prospective judicial action" which occurrs after the standard has been overruled.

Where, as in this instance, a procedural trial standard is created by statute which shifts the burden of proof from one party to another at trial--returning the law to what existed at the point the lawsuit was filed--absent some specific direction to the contrary, that change becomes applicable to trials which occurr from that point forward irrespective of any other interpretation which may have been applicable under a prior judicial construction.

Finally, the statutory requirements which are incorporated in CRA-91 provide no indication that Congress either outhorized or intended to permit a continued prospective application of the same proof formulation this legislation was enacted to replace.

b. STATUTORY SPECIFICATIONS INCORPORATED IN CRA-91 CONFIRM THE INTENT OF CONGRESS TO REINSTATE A PRE-WARDS COVE DISPARATE IMPACT BURDEN OF PROOF FORMULATION.

Section 105 (k)(1)(A) of the Act states:

> "An unlawful employment practice based on disparate imapact is established under this title only if (emphasis added)--
>
> "(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the practice is job related for the position in question and consistant with business necessity..."

The "Purposes" section states that the Act was intended to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964..." (emphasis added) This declaration expresses a clear and unmistakable direction that, when a suit is adjudicated--from the effective date of the statute forward--CRA-91 is to be the controlling statutory authority for that adjudication.

Black's Law Dictionary defines the term "adjudication" as,

> "The formal giving or pronouncing of a judgement or decree in a court proceeding; also, the entry of a decree by a court in respect to the parties in a

> case. Samuel Goldwyn, Inc. v. United Artists Corporation, C.C.A.Del., 113 F2d 703, 706. Tt implies a hearing by a court, after notice, of legal evidence on the factual issues(s) involved. Genzer v. Fillip, Tex.Civ.App., 134 S.W..2d 730, 732.

Petitioner argues that the limitation which is implicit in the specification "only if" both confirms and codifies the intent of Congress to return the prospective disparate impact burden of proof responsibilities of plaintiff and defendant at trial to what existed at the point this lawsuit was originated. As a result, this provision became the authoritative statement of law with respect to the procedural disparate impact proof requirements which were in fact applicable when this case was brought to trial. With respect to pre-1989 lawsuits, this definition had the effect of replacing any judicially-created doctrine which conflicted with or varied from the new statutory standard in trials occurring after November 21, 1991.

1) EVOLUTION OF DISPARATE IMPACT THEORY: Under traditional disparate impact doctrine, first outlined in Griggs V. Duke Power Co., 401 U.S. 424, 431 (1971) the plaintiff bears the

initial burden of proving a prima facie case of disparate impact. The plaintiff can meet this burden by showing that a particular device or procedure used by the employer in the selection or promotion of employees had adversely affected members of a protected class. The burden then shifts to the defendant to persuade the court that use of the particular device or procedure was dictated by "business necessity" and had a "demonstrable relationship to successful performance of the jobs for which it was used." If such a demonstration is made, a plaintiff can still prevail by proving that the defendant's justification is a pretext for discrimination. Both the burden of persuasion and burden of production shift at each stage in the litigation.

In Wards Cove Packing Co. v. Atonio, this Court altered traditional disparate impact in three significant ways. First, the specificity with which plaintiffs had to identify the challenged employment procedure was increased. Under Wards Cove, a plaintiff could no longer identify a group of practices that together had a disparate impact, but rather was required to

prove a causal connection between each one and the identified impact. Second, the defendant's burden with respect to the business necessity defense was reduced. Wards Cove held that the burden of persuasion never leaves the plaintiff, and therefore, defendants faced only a burden of production, not the burden of proving necessity.

Finally, the "business justification" requirement adopted in Wards Cove called for a determination that "the challenged practice served, in a significant way, the legitimate employment goals of the employer." This standard was met "when the practice advanced broader business goals of the defendant," rather than only when the practice was used to determine the employees' abilities to perform the particular job to which the procedure was applicable.

2) STATUTORY DIRECTION OVERRULING WARDS COVE REQUIREMENTS:

Early in the two year debate which preceded final emactment of this statute, both sides accepted that the Act should shift the burden to the defendant to prove business necessity. (137 Cong. Rec. S15,363 [daily ed.

Oct. 29, 1991]) The language of the Act is explicit enough to rule out the definition adopted in Wards Cove. First, by stating that an unlawful employment practice is established when a plaintiff demonstrates the disparate impact of a practice and the employer cannot prove that "the challenged practice is job related for the position in question and consistant with business necessity," Section 105 of the Act sufficiently defines the burden of proof in disparate impact cases to rule out the Wards Cove definition of business necessity. This language is transferred directly from Griggs, and adopts the standard the Griggs Court considered the very "touchstone" of business necessity. The Act could have codified the Wards Cove language of "business justification" or "legitimate business needs of the employer." By choosing the Griggs "business necessity" language, Congress indicated its intent to ground the test in terms of what it meant in Griggs.

Both the Purposes section and an interpretive memorandum reflecting the agreed exclusive legislative disparate impact history

of the Act state that Congress intended to codify the concepts of "business necessity" that were enunciated by the Supreme Court in Griggs. This conclusion is also indicated by the fact that Congress adopted the same language as the Americans With Disabilities Act employs to define business necessity, requiring the employer to prove a close connection between the challenged practice and the employee's ability to perform the job.

A number of other aspects of the Act indicate that Congress intended to reject the general theoretical approach of narrowing the application of disparate impact doctrine, most dramatically, by responding specifically, not just to one, but to six different Supreme Court decisions which narrowed the scope of civil rights in the employment field. The Findings and Purposes sections of the Act confirm an intent to "provide additional protections against unlawful discrimination" and that "the decision of the Supreme Court in Wards Cove...has weakened the scope and effectiveness of Federal civil rights protections." (See "The Civil Rights Act of 1991: The Business

Necessity Standard," Harvard Law Review, Vol. 106, No. 4, February, 1993)

The decision of Congress to codify a separate cause of action for disparate impact, distinct from the cause of action for intentional discrimination, as well as the its decision to shift the burden of proof to the defendant at the second stage of litigation--upon enactment of CRA-91--stands in significant tension with any assertion that the Act simply represents a reaffirmation of existing law. The "only if" limitation imposed by Section 105 (k)(1)(A) and the direct references in the Act to returning to Griggs concepts reveals instead that the intent of Congress which was codified in CRA-91 was distinctly at odds with the doctrine which both arose and was overruled between the time of the filing and the trial of this lawsuit.

A determination by a trial court calling for a continuation of a Wards Cove proof formulation which, prior to the commencement of trial, had been specifically overruled by Congress created a substantial injustice. The ruling is reversible error.

c. ASSIGNMENT OF AN OVERRULED WARDS COVE BURDEN OF PROOF STANDARD FOLLOWING ENACTMENT OF CRA-91 CREATED A MANIFEST INJUSTICE AT TRIAL.

In the course of this appeal, petitioner Robert W. Hartnagel has argued that the court below erred in failing to comply with the procedural requirements which became effective upon enactment of CRA-91 with respect to the allocation of disparate impact burden of proof responsibilities between plaintiff and defendant at trial and in failing to provide a disparate impact jury instruction.

In the original and amended complaints discribing the cause of action in this lawsuit, as well as in comprehensive pre-trial pleadings, trial testimony and documentary evidence admitted at trial, Hartnagel identified a facially neutral employment practice which was utilized throughout a major reduction in force occurring within his immediate work group. A direct causal relationship linking the identified employment practice to the substantial adverse age and gender impact the practice had produced also was demonstrated at trial. This showing exceeded the prima facie case requirements

assigned to plaintiffs under both pre-Act and a post-Act burden of proof standards.

The district court refused to grant respondant's motion for a directed verdict at the close of Hartnagel's case in chief, and expressed an intention to defer any action on the motion until all evidence in the trial had been presented. Because the official record does not preserve any of the trial judge's perceptions or conclusions regarding the respective proof demonstrations made by either party at the first or second stage of the disparate impact case presentations, it cannot be determined from the trial record precisely what basis the district court employed to reach its subsequent decision to withhold a proposed disparate impact instruction from the jury charge.

Petitioner argues that any conclusion by the trial judge reflecting a belief that, following enactment of CRA-91, a plaintiff was responsibile for overcoming a "business justification" explanation for an identified discriminatory disparate impact, had the effect of creating a substantial injustice. Such a

requirement exceeded the statutory burden which became effective following the enactment of CRA-91 and imposed a proof formulation which had been overruled by Congress.

The district court's determination that CRA-91 was not "retroactive" and would not be "applicable" at trial called for a continuation of the same (overruled) Wards Cove burden of proof standard that was in existance prior to the Act's effective date. The heightened expectations and correspondingly diminished perceptions of the merits of a plaintiff's case which are implicit in such a proof assignment significantly reduced Hartnagel's chances of prevailing in his disparate impact claim.

Withholding a substantial benefit and right which had been created by a federal statute abridged Hartnagel's Fourteenth Amendment due process rights and denied him a fair hearing and a jury determination regarding of the disparate impact cause of action this lawsuit presents.

d. IMPOSITION OF AN UNDULY RESTRICTIVE EVIDENTIARY TEMPORAL LIMITATION PREVENTED A FULL AND FAIR HEARING OF THE CLAIMS PRESENTED.

Hartnagel's request to be permitted to

continue his assignment in the newly-formed unit which assumed responsibility for the functions of his former 7-state region was denied by his employing unit on November 24, 1986. Following submission of a formal complaint under respondent's "Open Door" program, a previously discussed offer of employment was withdrawn, and for a total of thirteen months, while his job title remained unchanged and his compensation continued, he was prevented from functioning as an active employee. During this period, a five month communication "blackout" was imposed and his only available option was restricted to acceptance of "voluntary" separation on a cash buyout basis. In January, 1989, he was placed on involuntary layoff. This lawsuit was initiated on April 29, 1988.

On the first day of trial, Hartnagel's testimony provided a comprehensive account of the 13-month period, and subsequent four months of layoff, which preceeded the filing of this lawsuit. On the second day of trial, Hartnagel's attorney presented and individually described to the court--in conjunction with an

explicit offer of proof--a total of 20 proposed Plaintiff Trial Exhibits reflecting hiring, internal transfer, compensation and separation data which was directly applicable to the adverse impact which Hartnagel had identified within his immediate work group. Ten of the exhibits were summary documents reflecting continuing employment practices which plaintiff has alleged produced the patttern of discrimination this lawsuit indentifies. The remaining ten exhibits contained source data for the summary documents.

On the second day of trial, the district court ruled that no exhibits--or testimony--describing employment data prior to calendar year 1986 (the same year in which Hartnagel's active employment ceased) could be introduced at trial. The ruling had the effect of requiring the plaintiff to prove, on a preponderance of the evidence basis, that he had been a victim of unlawful discrimination <u>which occurred after he had been displaced</u> from active employment.

The trial judge clearly misapprehended the timing of Hartnagel's displacement, despite the

testimony which had been presented on the preceeding day and the description his attorney had provided in support of submission of the employment data.

In Defendant's Second Ammended Motion In Limini, submitted one day prior to the start of trial, respondent requested that plaintiff be instructed not to make comments in the presence of the jury concerning any alleged incident of discrimination occurring prior to April 29, 1986, since according to General Motors,

> "...any such acts of discrimination would be barred by the two-year statute of limitations applicable to the Age Discrimination in Employment Act, or any alledged incident of sex discrimination ...occurring prior to April 19, 1987, which is approximately 300 days prior to his filing of a charge of discrimination with the EEOC, for they are barred by the Plaintiff's failure to exhaust his administrative remedies under Title VII of the Civil Rights Act of 1964."

Under the continuing violation theory, a plaintiff who shows a continuing policy and practices which operated within the statutory period has satisfied the requirement that a discrimination charge be filed with the EEOC no later than 300 days following the discriminatory act. Where the last act alledged to be part of an ongoing pattern of

discrimination occurs within the filing period, allegations concerning the earlier acts are not time barred. Wilkins v. Walters D.C. Ohio, 1983, 571 F.Supp. 474; Jones v. Birdsong, D.C. Miss, 1980, 683 F.2d 417, 103 S.Ct. 1186, 459 U.S. 1202, 75 L.Ed.2d 433. See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) ("statistics as to petitioner's employment policy and practice may be helpful to a determination of whether case conformed to a general pattern of discrimination against black's"); Cambridge, 590 F.2d at 206 (evidence of employer's "pattern of action" is relevant)

In EEOC v. Recruit U.S.A., Inc., 939 F2d 746, 755 (9th Cir. 1991) the court found,

> "[s]uperimposing an artificially truncated time frame would risk excluding evidence relevant to previous instances of similar discriminatory practices."

Trial testimony and extensive pre-trial pleadings clearly identified the continuing adverse impact of a pattern of conduct which extended over a 28 month period immediately preceeding Hartnagel's displacement from active employment. The trial court's ruling imposed a 325-day evidentiary temporal limitation--the

statutory period roughly equivalent to the limitation applicable to the filing of a charge of discrimination. This limitation had the practical effect of destroying, at the midpoint of trial, every numerical summary trial exhibit which had been prepared for trial and preventing all testimony identifying the numerical pattern which, under a Wards Cove-based burden of proof, must be established on a "preponderance of the evidence" basis to support a discrimination claim.

The district court's ruling was arbitrary and unfair; it deprived petitioner of a full and fair opportunity to support his claims; and in and of itself, prevented any reasonable chance of proving the discriminatory effect of the conduct which preceeded, and indeed produced the unlawful adverse impact this lawsuit identifies.

2. FEDERAL JUDICIAL DOCTRINE WHICH ASSIGNS AN UNEQUIVOCAL AT-WILL MEANING TO AN EXPRESS CONTRACT CREATING A CLAENDAR MONTH EMPLOYMENT RELATIONSHIP MISINTERPRETS CONTROLLING STATE LAW AND EXCEEDS CONSTITUTIONAL LIMITS

For more than 26 years, petitioner was employed persuant to an express agreement which stated in pertinent part,

"2. The employee acknowledges that his employment under this agreement is from month to month only on a calendar month basis."

In testimony at trial, Hartnagel described an exchange of correspondence which occurred immediately in advance of his final separation, wherein he confirmed his understanding of the calendar-month-only contractual basis of his employment and informed his management that a breach of contract had taken place. Attached to Hartnagel's letter, which was introduced into evidence at trial, was an exerpt from respondent's official Salaried Personnel policy manual stating,

"The contractual employment period of a Regular employee is a calendar month."

The policy manual reference specifically confirms petitioner's contention that the employment relationship created by this express agreement was based on...specified term... calendar month...contractual periods of employment--only--as in solely and exclusively.

While this specification does not in itself require a continuation of the employment beyond any established calendar month period, neither does it in any way create

a wavier of any rights existing or acrued during a contractual period under the agreement. Without a supplemental express understanding specifically confirming some other purpose, the contract term identified above does not create or infer a mutual intent to relieve the employer of an obligation to provide "just cause" notice of termination within the operation of an existing calendar month contract.

As indicated by respondent's own personel policies, the contract specification was intended and believed by both parties to have precisely the opposite meaning. A contractual-calendar-month-only specification negates any at-will presumption which might otherwise attach to an employment relationship which was based solely on a "month to month" contract specification.

Following completion of both plaintiff and defendant case presentations at trial, however, the district court declined to submit a proposed breach of contract instruction to the jury seeking a determination of the fact issue applicable to Hartnagel's subsequent reliance

on an express promise of Job Security. This promise was made by General Motors 12 years after the initial agreement was signed.

Entirely unlike a general operating guideline which is communicated to employees in a company manual or emoloyee handbook, respondent's Job Security commitment was a separate, formal communication, personally addressed to each salaried employee and distributed immediately prior the start of a major downsizing program. This communication included a direct assurance to individuals who had been employed longer than five years that length of sevice would be the primary consideration "in any reduction in force situation." The announcement was not accompanied by any expressed or implied disclaimer.

A company bulletin which preceeded this communication described the Job Security commitment in the following manner:

> "It is a mutual trust. A pledge of good faith, from GM to you. A renewed commitment for good times and bad."

A signed memorandum accompanying the communication Hartnagel received included the

direct assurance that employees in his job classification were covered by respondent's promise, and announced that, with respect to management employees, a valuable second consideration (involving a required exemption from an extended income layoff benefit program applicable to non-management salaried employees) was being required in exchange for their inclusion under this pledge.

In declining to permit the submission of a breach of contract question to the jury, the district court ruled,

> "I find there is no modification of the month-to-month employment agreement and that under the law, and I think the law in Texas as well as Michigan, that the month-to-month employment contract can be terminated at-will. And the -- Plaintiff has absolutely no right to get to the jury on the alledged contractual issue."

In support of this ruling, the court relied on a 1987 Sixth Circuit opinion in Taylor v. General Motors, 826 R.2d 452 (6th Cir. 1987). No Texas case law has been identified by respondent General Motors in the course of this appeal which assigns an unequivocal at-will meaning to the particular contract specification presented above.

Following denial of a request for panel

rehearing in this appeal, the court below denied Hartnagel's petition for certification of a question of law to the Texas Supreme Court which was based, in part, on the contract issue identified above.

The district court's determination--made in conjunction with a trial proceeding which took place seven months after Hartnagel's employment had ended--assigned an after-the-fact at-will interpretation to a contractual relationship which in fact had consisted solely of specified term calendar month contractual periods of employment--not even one of which, under Texas law, had been subject to termination on an at-will basis.

Petitioner contends that the federal judicial doctrine reflected in both the Sixth Circuit opinion and district court breach of contract ruling is based on a fundamental misunderstanding of the employment circumstances applicable to both the Taylor and Hartnagel cases and represents an incorrect interpretation and statement of controlling state law. Both of the decisions are in conflict with the direction this Court provided

in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

The district court's application of Sixth Circuit doctrine to govern disposition of the question of Texas employment law which was presented in this lawsuit abridged petitioner's due process rights under the Fourteenth Amendment of the U.S. Constitution.

a. TEXAS AND MICHIGAN LAW DOES NOT ASSIGN AN UNEQUIVOCAL AT-WILL STATUS TO "CALENDAR MONTH" CONTRACTS ABSENT A SUPPLEMENTAL UNDERSTANDING.

Acceptance of the unequivical at-will interpretation of the contract provision "month to month only on a calendar month basis" requires an arbitrary presumption that the word "only" modifies the phrase "month to month" which immediately preceeds it. Considering the fact that the central (and unequivical) meaning inherent in the full sentence is that the parties clearly intended to create a calendar month employment relationship, it is at least equally reasonable to presume that the word "only" modifies the phrase "on a calendar month basis."

Under Michigan law, an at-will designation based on the stated terminology requires the parties to reach an additional mutual

understanding which clearly acknowledges an employer's right to terminate the relationship on an at-will basis. No such acknowledgement was shown to exist under the circumstances applicable to the Sixth Circuit's Taylor decision, nor has General Motors established that Hartnagel ever signed or was asked to sign such a statement. Rather, the Taylor decision, upon which the district court's ruling was based, appears simply to make reference to the unequivocal language in the "sign off sheet" which had been signed by the plaintiff in an entirely separate case, Dell v. Montgomery Ward, 811 F.2d 970 (6th Cir. 1987).

In Howell v. Career Decisions, Inc., 100 Mich.App. 561, 298 N.W.2d 915 (1980), the Michigan Court of Appeals confirmed that absent an agreement otherwise (emphasis added) the employee for an indefinite term (emphasis added) is terminable at will. While, standing alone, the term "month to month" may indeed create an indefinite term employment relationship, an agreement reflecting a mutual acknowledgement that employment will be only on a calendar month basis prevents any automatic

at-will termination presumption during and within an established calendar month specified term.

Texas employment law follows the general rule practiced in England, which dictates that "a hiring at a stated sum per week, month, or year, is a definite employment for the period named and may not be arbitrarily concluded." Dallas Hotel Co. v. Lackey, 203 S.W. .2d 557, 561 (Tex.Civ.App.--Dallas 1947, writ ref'd n.r.e.); Molnar v. Engels, 705 S.W. .2d 224, 225 (Tex.App.--San Antonio 1986). The employment contract which is at issue in this lawsuit also incorporated an agreed monthly compensation amount which was to be payable for services rendered by the employee "in any and every capacity" during the established contractual period.

Under Texas law, where an employee remains by request of his employer after the term originally contemplated has expired, it is presumed that the extended term is subject to the agreed terms of the employment. Houston Ice & Brewing Co. v. Nicolini (1906, CA) 96 SW 84, writ. ref. Thus, another weekly, monthly, or

other term commences at the expiration of each of the periods that the employment continues. Young v. Lewis (1852) 9 Tex. 73.

The Texas Supreme Court adopted the Texas employment-at-will doctrine in East Line and Red River R.R. Company v. Scott, 72 Tex 70 10 S.W. 102 (1888), by stating,

> "...when the term of service is left to the discretion of either party (emphasis added), or the term is left indefinite, or determinable by either party (emphasis added), that either party may put an end to it at will and so without cause."

The at-will rule does not apply where the employer explicitly contracts to provide employment for a definite duration. (A. Corbin, Corbin on Contracts, Section 96.)

b. AN AT-WILL CONTRACT DOES NOT RELIEVE AN EMPLOYER FROM HONORING AN EXPRESS JOB SECURITY COMMITMENT.

Texas courts have long recognized that an agreement between an employer and employee can modify what would otherwise be an at-will employment arrangement. (United Transportation Union v. Brown, 694 S.W.2d 630 Tex.App.-- Texarkana 1985, writ refd n.r.e.)

In Johnson v. Ford Motor Co., 690 S.W.2d 90 (Tex.App.-- Eastland 1985, writ refd n.r.e.,

the Court of Appeals determined that an at-will situation also can be modified by an oral agreement with supervisory personnel. The Fifth Circuit has held that "a drivers rule book" could be the foundation for the implication of a "just cause provision" in the discharge of a bus driver. Smith v. Kerrville Bus Co., 709 F.2d 914 (5th Cir. 1983)

In Aliello v. United Air Lines, Inc., 818 F.2d 1196 (5th Cir. 1987) at 1199, the Fifth Circuit stated, "under Texas law, an agreement between an employer and employee can modify what would otherwise be an at-will employment relationship." In rendering this opinion, the court took special notice of the circumstances addressed in Cleary v. American Airlines, 111 CalApp.3d 433, 168 Cal Rptr. 722 (Ca.2d Dr. Div 1. 1980, which recognized that, by creating practices which bind the employees and which purport also to be binding upon themselves, an employer...

> "could lead the employees to think that they are entitled to the rights which the company promises them. But then, when the company wishes to do so, it simply takes the position that its promise...has no meaning and that the company is free to discharge these longterm faithful employees for any reason, or for no

reason, and with no procedural protections.

> "Of significance to the case before us is the fact that while the company urges the "at will" right to discharge, it did actually recognize the employee's right to...use the procedures contained in the company regulations. But then when all this was done, the company now falls back on the "at-will" concept when the employee takes the next step in challenging (the discharge) by bringing a breach of contract suit in court. The strong element of misleading employees as to their rights and then cutting them off after seemingly granting them is, of course, what led the California court in the Cleary case to find that the company was estopped to claim "employment at will"..."

Under Texas law, the doctrine of detrimental reliance requires a showing of the existance of a promise "designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by the promisee before he could begin to perform, and was a fact known to the promisor. Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965)

The doctrine of "promissory estoppel" was articulated by the Texas Supreme Court in English v. Fischer, 660 S.W.2d 521, 524 (Tex

1983) as requiring (1) a promise, (2) the promisor's foreseeability of the promissee's reliance thereon, and (3) substantial reliance by the promisee to his detriment. All of these elements were clearly shown to be present with respect to the express Job Security pledge which was announced to General Motors salaried employees.

It is well established that parol evidence of subsequent representations of job security is fundamental to the equitable resolution of questions of employment equity under contract law. Such representations raise questions of material fact which must be resolved by a jury. Butzer v. Camelot Hall Convalescent Centre, Inc., 163 Mich. App. 194 454 N.W. .2d 122, 5 IER Cases 1276 (Mich. Ct. App. 1989)

c. THE INTEGRATION CLAUSE INCORPORATED IN HARTNAGEL'S EMPLOYMENT AGREEMENT DOES NOT IMPAIR RELIANCE ON SUBSEQUENT AGREEMENTS.

Respondent General Motors has suggested in federal court proceedings across the country that the language of paragraph 5 of the basic agreement governing employment of its U.S. salaried employees denies legal force to agreements occurring subsequent to the

execution of this document which are not initialled on the original employment contract. (See also Winters v. General Motors Corp., 715 F.Supp. 54 (W.D.N.Y. 1989) Petitioner argues that acceptance of this conclusion requires the same sort of unsupportable presumption concerning the intent of the parties as the one described earlier which attaches an at-will effect to paragraph 2 of the same agreement.

The integration clause incorporated in Hartnagel's contract states:

> "5. The Employer and the Employee acknowledge that there are no other arrangements, agreements, or understandings, verbal or in writing, regarding same and that any modification or ammendment hereof, other than a cancellation and replacement hereof by another written form of agreement, must be endorsed hereon in writing and initialed by both the Employee and the Employer." (emphasis added)

It is usual within the context of corporate employment relationships that a considerable number of contractual "understandings" may be created both before and after a basic employment agreement is signed (including for example, those dealing with "exempt" status under the Fair Labor Standards Act; benefit plan administration or even

savings bond payroll deductions). By signing a basic employment agreement, the parties obviously did not intend to acknowledge that none of these agreements would have legal effect unless they were initialled on the original contract.

Clearly, the terminology "regarding same" and "hereof" was intended to refer solely to changes which would have the effect of altering the particular specifications which are set forth in paragraphs 1-4 of the employment agreement itself. It cannot be reasonably asserted that this limitation was ever meant to acknowledge or to reflect an intent of the parties to prohibit either the formation of, or reliance on, subsequent agreements which did not alter these specific contract terms.

Any suggestion that this basic employment agreement either prevents or impairs the legal force of subsequent express agreements or understandings applicable to other aspects of the employment relationship--such as the incidents or priviledges of employment which result from an express promise of Job Security applicable during a continuation of that

employment--is not and cannot be supported on the basis of the language of paragraph 5 of Hartnagel's employment agreement.

d. THE FEDERAL DOCTRINE ESTABLISHED IN THE TAYLOR DECISION AND RELIED ON IN THE TRIAL COURT'S RULING EXCEEDS LIMITS PLACED ON FEDERAL JUDICIAL AUTHORITY BY THE U.S. CONSTITUTION.

A federal judicial doctrine which, unlike controlling state law, assigns an unequivocal at-will meaning to a calendar-month-only contract (absent a supplemental express understanding regarding "just cause" termination) is in direct conflict with the decision this Court rendered in Erie R.R. v. Tompkins. The "Erie doctrine" provides that federal courts have no power to create a body of general federal common law to govern substantive rights, and that this power is reserved to the states under the Tenth Ammendment of the U.S. Constitution.

A property interest in employment sufficient to invoke procedural due process protection may be created by ordinance or by implied contract. Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980) Sufficiency of a claim of entitlement to due process protection based on a property interest in employment must be

decided by reference to state law or implied understandings between the parties. Davis v. Nuss 432 R.Supp 44 S.D. Tex. (1977); Bishop v. Wood, 426 U.S. 341, 435 and L.Ed.2d 684 (1976).

The trial court's incorrect statement of Texas law and refusal to submit a breach of contract instruction to the jury deprived Hartnagel of a Fourteenth Amendment due process right to redress the harm inflicted by his employer's failure to perform on an express promise of job security. The judicial doctrine which produced this error should be reexamined and revised by this Court to bring federal employment contract interpretation into conformance with controlling state law.

3. THE USE OF JUDGEMENT ORDERS TO DISPOSE OF ISSUES PRESENTED FOR APPELLATE REVIEW EXCEEDS THE AUTHORITY THIS COURT HAS GRANTED WHERE THE MATTERS UNDER REVIEW REQUIRE NEW INTERPRETATIONS OF FEDERAL STATUTES OR INVOLVE NEW APPLICATIONS OF THE LAWS OF DIFFERENT STATES

In N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, L.990, 430 F.2d 966 (1870), the Fifth Circuit Court of Appeals stated:

> "Foremost , we are a court of review and in the Federal system a court of review of cases in which appeal is nearly always a right, not a certiorari-type

discretion...

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is the very discursive statement of those articulated reasons is the thing out of which law--and particularly Judge-made law--grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like...
>
> "By Rule 21 the Court not only implicitly assumes the responsibility...but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precidential value...Rule 21...must be sparingly used." (at pg. 972)

Petitioner is aware of the beneficial and essential reasons for employing the "Affirmance Without Opinion" mechanism to administer the great number of appeals which must be addressed, and fully appreciates the need for "husbanding limited and precious judicial resources" by eliminating unnecessary opinions.

The issues addressed in this petition are believed to present matters of significant

legal precident requiring new interpretations of a federal statute, federal judicial doctrine and state law. Affirmance Without Opinion did not provide an appropriate disposition for this appeal.

K. CONCLUSION

In the Landgraf and Rivers decisions, this Court specifically acknowledged the possibility of encountering exceptions to the general non-retroactivity guidelines which these opinions set forth. This petition presents just such a clear and legitimate exception.

Resolution of the lingering uncertainties surrounding the effect and intent of the Civil Rights Act of 1991 is of immense importance to individuals whose lawsuits, like this one, have traversed a legal process which has spanned the entire period during which these major procedural changes were taking place.

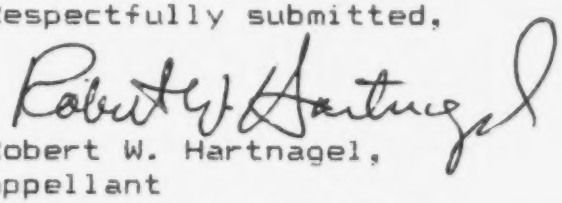
The Sixth Circuit opinion in Taylor v. General Motors Corp., incorporates a federal judicial doctrine which improperly denies employees an important contractual right. The application of this doctrine on an after-the-fact basis to prevent jury

consideration of a breach of contract question reflecting an employee's reliance to detriment on an express promise of Job Security significantly extends the harm this doctrine can inflict. Reconsideration of this opinion and the trial practice it has produced is both appropriate and necessary.

For the reasons herein stated, this Court should remand this case for retrial on the merits of petitioner's discrimination and breach of contract cause of action.

Dated this 6th day of March, 1995.

Respectfully submitted,



Robert W. Hartnagel,
Appellant
7605 Carta Valley Drive
Dallas, Texas 75248
Telephone: (214) 233-8090

CERTIFICATE OF SERVICE

Persuant to Supreme Court Rule 29.5, I hereby certify that on this 6th day of March, 1995, forty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States by depositing the same in the United States mail at Dallas, Texas, first class, postage prepaid, addressed to the Clerk, the Supreme Court of the United States of America, Washington, D.C. 20543. I also certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the persons identified below by depositing the same in the United States mail at Dallas, Texas, first class, postage prepaid, and properly addressed to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

James K. Peden
Strasburger & Price
Counsel to General Motors Corp.
901 Main Street
Dallas, Texas 75202

Robert W. Hartnagel

APPENDIX

Court of Appeals Decision, September 6, 1994

Trial Court Final Judgement, January 31, 1992

(Filed September 6, 1994)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1176

ROBERT W. HARTNAGEL,

Plaintiff-Appellant

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

(CA3-88-0396-R)

Before GARWOOD, JOLLY and STEWART,
Circuit Judges.*

PER CURIAM:

AFFIRMED. See Local Rule 47.6

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* Local Rule 47.5 provides: "The publication of opinions that have no precidential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Persuant to that Rule, the Court has determined that this opinion should not be published.

(Filed January 31, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT W. HARTNAGEL,

Plaintiff

vs. CA 3-88-0396-R

GENERAL MOTORS CORPORATION,

Defendant.

FINAL JUDGEMENT

Based upon the jury verdict, judgement is entered in favor of the defendant General Motors Corporation, ant this case is DISMISSED with prejudice, with costs taxed against the plaintiff Robert W. Hartnagel.

SIGNED THIS 31st DAY OF JANUARY, 1992.

s/ Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER